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No. 296.

In the Supreme Court of the United States

October Term, 1943.

CHARLES J. MACH, *Petitioner,*

vs.

THE ABBOTT COMPANY, a Corporation, *Respondent.*

PETITIONER'S REPLY TO RESPONDENT'S STATEMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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PETITIONER'S REPLY TO RESPONDENT'S STATEMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Rule 38 of this court requires that briefs filed in support of the petition for writ of certiorari be direct and concise and this rule was followed by petitioner. Because of the great length of the respondent's brief in this matter and the misstatements contained therein, petitioner finds it necessary to point out to the court these errors. The decision of the court of appeals has since the printing of the petition been reported and can be found at 136 F. (2d) 7.

I.

The District Court was not acting within the authority of Sec. 75 (s) (2) of the Bankruptcy Act in determining that it had authority to begin the three-year stay period on March 22, 1940, in its order filed May 29, 1940.

Respondent has recognized that this case is to be decided on the main question presented to this court. Did the District Court have power to retroactively begin the three-year stay period on March 22, 1940, the day the appraisal was filed, in its order filed September 29, 1943?

Respondent stated that the District Court on October 27, 1938 (R. 36), began the three-year stay period on that date. That no appraisal had been made at that time is conceded by the respondent. It is then contended that this order became valid and effective automatically without any further action of the court on March 22, 1940, the date the appraisal was filed. This court has held that under Sec. 75 (s) (2) of the Bankruptcy Act that the law does not contemplate that any stay whatever may be granted until after the making of an appraisal. *John Hancock Mutual Life Insurance* v. *Bartels,* 308 U. S. 180, 60 S. Ct. 221, 84 L. Ed. 176; *Borchard* v. *California Bank,* 310 U. S. 311, 60 S. Ct. 957, 84 L. Ed. 1222; *Wright* v. *Union Central Life Insurance Co.,* 311 U. S. 273, 61 S. Ct. 196, 85 L. Ed. 184.

Respondent cites these cases of this court as authority that the District Court had power to begin the three-year stay period on March 22, 1940, in its order filed September 29, 1942. In coming to this conclusion, the respondent distorts the facts and ruling of this court in *Borchard* v. *California Bank, supra.* Respondent contends that the only appraisal that was made in that case was on March 25, 1935, under Sec. 75 (a) to (r) of the Bankruptcy Act (Res. Br. 15) and that no other appraisal was made.

The decision of that case shows (p. 1223 of 84 L. Ed. and 314 of 310 U. S.) that on September 10, 1935, the case was reinstated under Sec. 75 (s) of the Bankruptcy Act, and on October 18, 1935, the petitioner, Borchard, presented his petition under Sec. 75 (s) praying that an appraiser be appointed. An appraisal was made in 1938 and in connection with this appraisal this court said (p. 1224 of 84 L. Ed. and 315 of 310 U. S.):

> "May 24, 1938, the debtors petitioned the Conciliation Commissioner for an appraisal and the setting aside of the property to them, June 22, 1938, appraisers were appointed and they reported the value of the real estate as $87,300. It does not appear what, if any, proceedings were had before the Conciliation Commissioner upon the coming in of the appraisers' report."

Clearly, an appraisal was filed under the facts in the above case after March 25, 1935. It is noted that the court in stating the above facts states that no proceedings were had before the Conciliation Commissioner. This refers without question to the orders that are required to be made by Commissioner under Sec. 75 (s) (1) of the Bankruptcy Act after the appraisal has been filed. No such orders were made by the Commissioner in the case at bar after the appraisal was made on March 22, 1940.

This court did not hold in the *Borchard* case that the three-year stay period began on June 22, 1938, the date the appraisers filed their report, but instead approved the language in *John Hancock Mutual Life Insurance* v. *Bartels,* that Sec. 75 (s) and its subsections provided an orderly procedure to be followed, and then said (p. 1225 of 84 L. Ed.):

> "That orderly procedure includes an application by the debtor, such as was made in the present case,

> for an appraisal of the property, an order that the debtor remain in possession upon terms fair and equitable to him and to secure creditors, and the entry of a stay which will assure him of his possession for three years from the date of the order, upon the conditions mentioned in the Act."

Clearly, under the language used above this court held that the three-year stay period began from the date of the order of the court if the conditions met in the Act had been met. In the case at bar the first order of the court, after an appraisal had been made, was filed May 29, 1942, and this order was made without any orders of the Conciliation Commissioner's that are required under Sec. 75 (s) (1) of the Act.

In a case reported since the filing of our petition, *Corey* v. *Blake,* 136 F. (2d) 162, the Ninth Circuit Court of Appeals has passed upon this precise question. The court, l. c. 165, said:

> "Paragraph (1) of subsection s provides: 'After the value of the debtor's property shall have been fixed by the appraisal herein provided, the referee shall issue an order setting aside to such debtor his unencumbered exemptions, and his unencumbered interest or equity in his exemptions, as prescribed by the State law, and shall further order that the possession, under the supervision and control of the court, of any part or parcel or all of the remainder of the debtor's property shall remain in the debtor, as herein provided for, subject to all existing mortgages, liens, pledges, or encumbrances.' Thus, when appellants' property shall have been appraised as provided for in subsection s, it will be the duty of the commissioner (a) to issue an order setting aside to appellants their unencumbered exemptions, and their unencumbered interest or equity in their exemptions, as prescribed by State law, and (b) to

order that the possession, under the supervision and control of the court, of some part or parcel or all of the remainder of appellants' property shall remain in appellants, as provided for in subsection s, subject to all existing mortgages, liens, pledges or encumbrances. The commissioner has not made or issued either of these orders, and cannot do so until appellants' property shall have been appraised.

"Paragraph (2) of subsection s provides:

'When the conditions set forth in this section have been complied with, the court shall stay all judicial or official proceedings in any court, or under the direction of any official, against the debtor or any of his property, for a period of three years. During such three years the debtor shall be permitted to retain possession of all or any part of his property, in the custody and under the supervision and control of the court, provided he pays a reasonable rental semiannually for that part of the property of which he retains possession.' Thus, when the orders required by paragraph (1) shall have been made, it will be the duty of the commissioner to make the order required by paragraph (2), namely, an order staying all judicial or official proceedings in any court, or under the direction of any official, against appellants or any of their property, for a period of three years. The commissioner has not made that order and cannot do so until the orders required by paragraph (1) shall have been made."

Without any orders made by Sec. 75 (s) (1) an order was made in the above case granting a three-year stay period after an improper appraisal. In this connection the court said (l. c. 166):

"The order was unauthorized and improper. It did not conform to the requirements of paragraph (2) and, if it had done so, would have been premature, for the orders required by paragraph (1) had not been made, and have not yet been made."

In the case at bar the District Court ordered that three appraisers be appointed (R. 2, 3), and only two were appointed to appraise the property involved herein by the Conciliation Commissioner (R. 40), and no orders were made after the appraisal was filed by the Commissioner as required by Sec. 75 (s) (1) of the Bankruptcy Act. Clearly, on these facts the facts in this case come within the rule laid down by the Ninth Circuit in *Corey* v. *Blake, supra,* and this court in *Borchard* v. *California Bank, supra.*

Judge Delehant, who rendered the decision in the case at bar, also rendered the decision in the case of *In Re Whitwer,* 44 F. Sup. 466. It is interesting to note that the stay period in this case began on the day of the court's order, and that Judge Delehant after setting out in full Sec. 75 (s) (1) of the Bankruptcy Act, ruled, l. c. 469, that the three-year stay period could only begin after the preliminary steps [Sec. 75 (s) (1)] have been completed. He further stated that "a formal approval of the appraisal may ultimately be intruded into the Act through judicial construction" and without deciding "that an element of approval may necessarily be involved in the orders of the judge granting stays." We cannot see how this case helps the respondents.

In the case of *In re Gamill,* 45 F. Sup. 238, cited by respondent, the facts reflect that the case was closed, on order of abandonment, and leave for the secured creditors to pursue their remedies in the state court was made on June 5, 1940. No appeal was taken and this order became final. The bankrupt's petition was filed a year later to prevent the state courts from proceeding with the disclosure. The court property held, l. c. 242, that the order of abandonment "has long since become final and the bankrupt's petition must be and is denied."

We submit that the orderly procedure required by the

statute was not followed in the case at bar, and that the District Court had no power to begin the three-year stay period on March 22, 1940, in its order filed May 29, 1942.

II.

Facts of the case in the District Court.

Counsel for the petitioner before this court and in the Circuit Court of Appeals were not his attorneys before the District Court. We, therefore, cannot say absolutely what occurred at the hearing on September 13, 1942, but have had to rely on the record and files forwarded to us by our predecessors in this case.

Before the Court of Appeals neither party briefed, argued or cited any cases that the petitioner herein appealed from an order in his own behalf and the opinion rendered by that court on this point and cases cited were raised by that court.

The record discloses that the motion (R. 114) was filed by the petitioner on his own behalf and not by his attorneys. Petitioner has so advised us of this fact and that this is true is shown by the fact that all other motions in the record were filed for him and signed by his attorneys. The motion (R. 114) was filed on February 17, 1942, and the record shows that a new attorney, George B. Clark, entered his appearance on March 9, 1942 (R. 115). Among the papers forwarded to us was the memorandum brief of Mr. Clark, and this appears in the record at pages 148, 149 and 150. This brief clearly reflects that Mr. Clark argued that the stay period began on the date of the court's order and not on the date the appraisal was filed.

We have obtained the following affidavit from Mr. Clark, and are filing with this reply brief the sworn copy of said affidavit:

"*State of Nebraska, County of Holt—ss.*

GEORGE B. CLARK, upon being duly sworn and upon his oath, states that he was one of the attorneys in the District Court for Charles J. Mach in the case of Charles J. Mach v. The Abbott Company now pending before the United States Circuit Court of Appeals, Eighth Circuit, No. 12422—In Bankruptcy.

Affiant further states that he appeared for Charles J. Mach at the hearing on May 13, 1942, before the District Court and that he argued on that date before Judge Delehant the questions presented in his brief and argument as set out on pages 4, 5 and 6 of the appellant's petition for rehearing.

Affiant further states that he never argued or contended before the court that the stay order should begin on March 22, 1940, but at all times argued that the stay order should begin on the date of the court's order after an appraisal had been filed.

GEORGE B. CLARK.

Subscribed and sworn to before me this 13 day of July, 1943.

CLAIR GRIMES,
Notary Public.

My commission expires Jan. 27, 1947."

The above affidavit was filed in the Eighth Circuit Court of Appeals in support of our petition for rehearing, and that court ordered it stricken from the record. We have filed it again in this court as evidence that the District Court had before it the question as to whether the stay period began on the day of the court's order or on the date the approval was filed.

III.

Petitioner can attack in this court the void order of the District Court.

Respondent states that none of the cases cited by petitioner on page 18 and 19 of its petition involve bankruptcy proceedings and, therefore, should not be considered. No cases can be found involving bankruptcy proceedings on this point. Neither are any cases cited by the Court of Appeals and set out on page 24 of the respondent's brief involve a bankruptcy proceeding.

Respondent cites *In re McGoldrick*, 121 F. (2d) 746, as authority that the conditions required by the Bankruptcy Act need not be complied with before order of sale is entered. The record in that case does not disclose that an appraisal was requested by the debtor after he had been adjudicated a bankrupt under Sec. 75 (s) of the Act. Since no appraisal was requested, it therefore was not necessary for the court to follow the procedure when such an appraisal is requested. When such a request is made, it is, of course, essential that the court follow the prescribed procedure so that the estate can be conserved for the benefit of both the debtor or creditor. A request was made for an appraisal in the case at bar (R. 1) and the court ordered an appraisal made (R. 2).

In re Denney, 135 F. (2d) 184, is cited by respondent as authority that the debtor can waive the correct procedure. The record discloses in that case that the debtor, with his attorney, understandingly and voluntarily agreed to another procedure. No such fact appears in this case and it is clearly distinguishable.

Conclusion.

Throughout the respondent's brief are various statements questioning the good faith of the petitioner. It is asserted without specifying the record page, that the petitioner has not obeyed the orders of the court and that he is attempting to make a mockery of the courts and defeat the end of justice. It is stated that he waited two years to call the attention of the District Court (Br. 28) to the fact that no appraisal had been made, and then obtained the appraisal which he should have obtained over two years previously. These statements are without foundation and made to prejudice this court against the petitioner.

Respondent knows that the District Court ordered the appraisal, and the Circuit Court of Appeals in this connection said, "The debtor requested an appraisal in his petition to be adjudged a bankrupt, and it cannot fairly be said that it was his fault that the Conciliation Commissioner did not order a prompt appraisal" (R. 142, 143). Three times throughout the proceeding (R. 32, 55, 118) the respondent filed application and was denied leave to proceed with the foreclosure in the state court.

Respondents and its attorneys further knew that there had been no appraisal before March 22, 1940, and no proper orders after that date as required by Sec. 75 (s) (1) of the Bankruptcy Act. Nothing was done by them because they believed the court would end the three-year stay period on October 27, 1941, three years after the court's order on October 27, 1938.

In *Borchard* v. *California Bank, supra,* this court, on page 1225 of 84 L. Ed. 1225 and 318 of 310 U. S., clearly states that the creditor in that case was at fault in obtaining no action by the Conciliation Commissioner in accordance with the statute.

The record reflects that a disorderly and unauthorized procedure was followed in the District Court. The debtor requested an appraisal in his petition (R. 1), and the court ordered the Conciliation Commissioner to appoint three appraisers and make an appraisal (R. 2). No appraisal was made, but the court, nevertheless, made an order beginning the three-year stay order on October 27, 1938 (R. 36). An appraisal was filed, however, on March 22, 1940, by two appraisers instead of three (R. 40). A second appraisal was filed September 4, 1940. Neither the first nor second appraisal was approved by the Commissioner or Court, nor any orders as required by Sec. 75 (s) (1) made by the Commissioner or court. Then the District Court, in his order filed May 29, 1942, reversed the previous order starting the three-year stay order on October 27, 1938, and instead began it retroactively on March 22, 1940, the date the first appraisal was filed.

We submit that the procedure followed in this case was anything but orderly. Neither was a valid appraisal made by three appraisers as required by the court's order (R. 2), nor were orders after the appraisal made by the Commissioner as required by Sec. 75 (s) (1) of the Bankruptcy Act. Certainly, under such facts the District Court had no authority to enter his order May 29, 1942, retroactively beginning the stay order on March 22, 1940.

Respectfully submitted,

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